EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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# Danish authorities' refusal to grant family reunion to Danish citizen of Togolese origin and his Ghanaian wife was justified

In today's Chamber judgment in the case of **Biao v. Denmark** (application no. 38590/10), which is not final[1], the European Court of Human Rights held:

unanimously, that there had been **no violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights, and

by four votes to three, that there had been **no violation Article 14 (prohibition of discrimination) in conjunction with Article 8** of the European Convention.

The case concerned the complaint by a naturalised Danish citizen of Togolese origin and his Ghanaian wife that they could not settle in Denmark because the Danish authorities refused to grant them family reunion as they did not comply with the requirement that they must not have stronger ties with another country, Ghana in the applicants' case, than with Denmark (known as the "attachment requirement"). They also complained that an amendment to the Aliens Act in December 2003 – lifting the attachment requirement for those who held Danish citizenship for at least 28 years – resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life.

The Court found in particular that the Danish authorities had struck a fair balance between the public interest in ensuring effective immigration control, on the one hand, and the applicants' need to be granted family reunion in Denmark, on the other. The couple had never been given any assurances by the Danish authorities that Ms Biao would be granted a right of residence in Denmark and, following amendments to the Aliens Act which had entered into force before their marriage, they could not have been unaware of the precarious nature of her immigration status when she entered Denmark on a tourist visa. Indeed, there was nothing to prevent the couple from exercising their right to family life in Ghana where they both had strong ties.
As concerned the discrimination issue, the Court held in particular that that there had been a difference in treatment between Mr Biao who had been a Danish national for fewer than 28 years and persons who had been Danish nationals for more than 28 years. However, refusing to exempt Mr Biao, who had only been a Danish national for two years when his request for family reunion had been rejected (in 2004), from the attachment requirement could not in the Court's view be considered disproportionate to the aim of the 28-year rule, namely to favour a group of nationals, who had lasting and long ties with Denmark and who could be granted family reunion with a foreign spouse without problems as the spouse could normally be successfully integrated into Danish society.

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

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## Principal facts

The applicants, Ousmane Ghanian Biao, a Danish national, and his wife, Asia Adamo Biao, a Ghanian national, were born in 1971 and 1979, respectively. They currently live in Malmö in Sweden.

Mr Biao was born in Togo and lived there until the age of six when he went to live in Ghana with his uncle until the age of 21. He entered Denmark in July 1993 and, having married a Danish national in November 1994, was issued with a residence permit in 1997. He learnt Danish and had steady employment for the next five years and was granted Danish nationality in 2002.

In the meantime, Mr Biao divorced in 1998. In the period from 1998 to 2003 he visited Ghana four times and during his last visit there, in February 2003, he married his current wife, Asia Adamo Biao, born and raised in Ghana. At the time she had never visited Denmark and did not speak Danish. The couple spoke in the Hausa and Twi languages.

A week after their marriage, Ms Biao requested a residence permit for Denmark, which was refused by the Aliens Authority on 1 July 2003. The authorities found in particular that the applicants did not comply with the requirement that a couple applying for family reunion must not have stronger ties with another country, Ghana in the applicants' case, than with Denmark (known as the "attachment requirement").

Ms Biao's appeal to the Ministry of Refugee, Immigration and Integration Affairs was also refused in August 2004. The authorities found in particular that they could settle in Ghana as Ms Biao had always lived and had family there and Mr Biao had ties with the country having attended school there for ten years. As Mr Biao had himself explained, he could also obtain a residence permit if he found employment in Ghana.

In July 2006 the applicants brought proceedings before the High Court of Eastern Denmark, alleging discrimination under the European Convention of Human Rights and the European Convention on Nationality. They submitted, in particular, that an amendment to the Aliens Act in December 2003 lifting the attachment requirement for those who had held Danish citizenship for at least 28 years ("the 28-year rule") resulted in a difference in treatment between two groups of Danish nationals, namely those born Danish nationals and those who acquired Danish nationality later in life. Mr Biao could not therefore be exempted from the attachment requirement until 2030 when he would reach the age of 59. In September 2007 the High Court found that the refusal to grant the applicants family reunion on account of the attachment requirement and the 28-year rule did not breach either the European Convention on Human Rights or on Nationality.

This decision was subsequently upheld by the Supreme Court in January 2010. It found that the attachment requirement had been extended to include Danish nationals because there were some Danish nationals who were not particularly well integrated into Danish society, meaning the integration of their spouse in Denmark could be problematic. The 28-year rule then relaxed the relevant provision of the Aliens Act so that in cases where one of the partners had been a Danish national for at least 28 years, family reunion was no longer subject to the attachment requirement, the aim being to distinguish a group of nationals who, seen from a general perspective (such as Danish expatriates), had lasting and long ties with the country. Nor did the Supreme Court find that the consequences for Mr Biao were disproportionate, as the application for family reunion had been refused after he had resided in Denmark from 1993 to 2004, of which only two as a Danish national.

In the meantime, in July or August 2003 Ms Biao entered Denmark on a tourist visa. In November 2003 the couple moved to Sweden where they had a son, born in May 2004. Their son has Danish nationality due his father's nationality.

## Complaints, procedure and composition of the Court

Mr and Ms Biao complained that the decision of August 2004 refusing to grant Ms Biao a residence permit in Denmark for family reunion breached their rights under Article 8 (right to respect for private and family life). The applicants also relied on Article 14 (prohibition of discrimination) in conjunction with Article 8, alleging that the amendment to the Aliens Act in December 2003 – lifting the attachment requirement for those who held Danish citizenship for at least 28 years – resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life. They also alleged that the 28-year rule implied a difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin since the vast majority of persons born Danish would be of Danish ethnic origin, while persons acquiring Danish nationality later in life would generally be of other ethnic origin.

The application was lodged with the European Court of Human Rights on 12 July 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Peer **Lorenzen** (Denmark),
András **Sajó** (Hungary),
Nebojša **Vučinić** (Montenegro),
Paul **Lemmens** (Belgium),
Egidijus **Kūris** (Lithuania),
Robert **Spano** (Iceland),

and also Stanley **Naismith**, *Section Registrar.*

## Decision of the Court

### Article 8 (right to respect for private and family life)

The Court recalled that a State was entitled to control the entry of aliens into its territory and their residence there. Article 8 did not oblige a State to respect an immigrant's choice of the country of their residence or to authorise family reunion on its territory. A State's obligation to admit relatives of persons residing on its territory will vary according to the particular circumstances of the persons involved and the general interest.

In the applicants' case, the Court found that the Danish authorities had struck a fair balance between the public interest in ensuring effective immigration control, on the one hand, and the applicants' need to be granted family reunion in Denmark, on the other.

First, Mr Biao had strong ties to Togo, Ghana and Denmark; and, his wife had very strong ties to Ghana but no ties to Denmark apart from having married Mr Biao who lived in Denmark and had Danish citizenship.

Furthermore, they had never been given any assurances by the Danish authorities that Ms Biao would be granted a right of residence in Denmark. The attachment requirement having entered into force in July 2002, the couple could not have been unaware when they married – in February 2003 – that Ms Biao's immigration status would make any family life in Denmark precarious for them from the outset. Moreover, once they had had the authorities' refusal of July 2003 to grant family reunion, Ms Biao could not have expected any right of residence by simply entering the country on a tourist visa.

Indeed, Mr Biao himself had stated that, if he obtained paid employment in Ghana, he and his family could settle there. Therefore the courts had found that the refusal to grant Ms Biao a residence

permit in Denmark did not prevent the couple from exercising their right to family life in Ghana or any other country.

Accordingly, the Court held that there had been no violation of Article 8.

### Article 14 (prohibition of discrimination)

For an issue to arise under Article 14, there had to be a difference in treatment of persons in relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective or reasonable justification.

In the Court's view Mr and Ms Biao had failed to substantiate having been discriminated against on the basis of race or ethnic origin in the application of the 28-year rule. It recalled that non-Danish nationals who had been born and raised in Denmark, or came to Denmark as small children and had been raised there, and who had stayed lawfully in the country for 28 years, were exempted from the attachment requirement. The Court did find, however, that there had been a difference in treatment between Mr Biao who had been a Danish national for fewer than 28 years and persons who had been Danish nationals for more than 28 years.

As concerned that difference in treatment, the Court recalled that at the relevant time the applicants' aggregate ties to Denmark had clearly not been stronger than their ties to another country. As already concluded above, Mr Biao had strong ties with Denmark, Togo and Ghana, but Ms Biao had no ties to Denmark at all but for being a newly wed to Mr Biao. Furthermore, in 2004 Mr Biao had been a Danish national for less than two years, when he had been refused family reunion. Refusing to exempt Mr Biao from the attachment requirement after such a short time could not in the Court's view be considered disproportionate to the aim of the 28-year rule, namely to favour a group of nationals, who – seen from a general perspective – had lasting and long ties with Denmark and who could be granted family reunion with a foreign spouse without problems as the spouse could normally be successfully integrated into Danish society.

Consequently, in the specific circumstances of Mr and Ms Biao's case, there had been no violation of Article 14 taken in conjunction with Article 8.

## Separate opinions

Judges Raimondi and Spano expressed a joint concurring opinion and Judges Sajó, Vučinić and Kūris expressed a joint dissenting opinion. These opinions are annexed to the judgment.

*The judgment is available only in English.*

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